Supreme Court, U.S.
FILED
DEC 15 1994
OFFICE OF THE CLERK

No. 94-329

IN THE

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF STUDENT PRESS LAW CENTER, *AMICUS CURIAE,* IN SUPPORT OF NEITHER PARTY

S. Mark Goodman*
Michael Hiestand
Student Press Law Center
1101 Wilson Blvd., Suite 1910
Arlington, Virginia 22209
(703) 807-1904

*Counsel of Record

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

TABLE OF AUTHORITIES

Page

Antonelli v. Hammond,
308 F. Supp. 1329 (D. Mass. 1970) 6

Arkansas Writers' Project Inc. v. Ragland,
481 U.S. 221 (1987) 3, 4, 7

Bazaar v. Fortune,
476 F.2d 570, *aff'd en banc with modification*,
489 F.2d 225 (5th Cir. 1973)(*per curiam*),
cert. denied, 416 U.S. 995 (1974) 6

Bethel School District v. Fraser,
478 U.S. 675 (1986) 5

Bystrom v. Fridley High School,
822 F.2d 747 (8th Cir. 1987) 6

Carey v. Brown,
447 U.S. 455 (1980) 4

Consolidated Edison Co. v. Public Service Commission,
447 U.S. 530 (1980) 4

Gay and Lesbian Students Association v. Gohn,
805 F.2d 361 (8th Cir. 1988) 3, 7

Hazelwood School District v. Kuhlmeier,
484 U.S. 260 (1988) 5

Healy v. James,
408 U.S. 169 (1971) 5

Page

Joyner v. Whiting,
477 F.2d 456 (4th Cir. 1973) 6, 7

Keyishian v. Board of Regents,
385 U.S. 589 (1976) 5

Mississippi Gay Alliance v. Goudelock,
536 F.2d 1073 (5th Cir. 1976), *cert. denied*,
430 U.S. 982 (1977) 6

Panarella v. Birenbaum,
32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973) 6

Papish v. Board of Curators of the University of Missouri,
410 U.S. 667 (1973) 5

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972) 4

Regan v. Taxation With Representation,
461 U.S. 540 (1983) 5

Regan v. Time Inc.,
468 U.S. 641 (1984) 4

Rosenberger v. Rector and Visitors of the University of Virginia,
18 F.3d 269 (4th Cir. 1994) 3, 4, 7

Rust v. Sullivan,
500 U.S. 173 (1991) 5

Schiff v. Williams,
519 F.2d 257 (5th Cir. 1975) 6

Page

Sinn v. Daily Nebraskan,
829 F.2d 662 (8th Cir. 1987) 6

Stanley v. Magrath,
719 F.2d 279 (8th Cir. 1983) 6

State Board for Community Colleges v. Olson,
687 P.2d 429 (Colo. 1984) 3, 6

Thonen v. Jenkins,
491 F.2d 722 (4th Cir. 1973) 5

Widmar v. Vincent,
454 U.S. 263 (1980) 7

IN THE

Supreme Court of the United States

October Term, 1994

No. 94-329

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS
OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF STUDENT PRESS LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Student Press Law Center ("SPLC") is a national, not-for-profit, incorporated, legal research, information and advocacy organization formed for the purpose of educating high school and college journalists about the importance of the First Amendment and defending their free press rights. Since its

founding in 1974 by professional journalists and journalism educators, the SPLC has collected information on freedom of expression, freedom of information and other media-related legal issues of interest to the student press and has produced numerous publications on these topics. Among those issues is the effort by school officials and student governments at public colleges and universities to censor the college press through the denial of student activities fees. As the only national organization devoted exclusively to student press freedom, the Center acts as source of free information for student journalists, and in 1993, for example, provided assistance to over 1,900 student journalists, their advisers and interested others. The SPLC has submitted numerous *amicus curiae* briefs, including a brief before this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

Because the ruling the Court reaches in this case will have an impact on thousands of college student publications around the nation, the vast majority of whom receive some student activity funding from their school, *amicus* has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the facts of the case as presented by the Court of Appeals in its decision.

SUMMARY OF ARGUMENT

In this case, the Court is confronted with two important questions:

1) Before a public university may deny funding to a student publication based on its content, what standard does the First Amendment require that the university's actions meet?

2) Does the fact that a student publication's content is pervasively religious satisfy the requirements of that standard because of the Establishment Clause of the First Amendment?

Amicus offers no discussion or analysis of the second question presented above; we leave that issue to be debated by the parties and other *amici*. Instead we focus solely on the first issue: defining the standard a public university must meet before its content-based denial of funding to a student publication will satisfy constitutional requirements. We urge the Court to affirm the Court of Appeals' holding that "[i]n order to justify differential treatment of funding eligibility based on the content of the speech involved, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269, 281 (4th Cir. 1994)(citing *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

ARGUMENT

As petitioners readily admit, there is no automatic right to student activity fee funding from the university for support of student expression. A government decision to deny funding for expressive activity does not necessarily implicate the free speech and free press protections of the First Amendment. For example, a university could refuse to fund a publication because it is not produced primarily by students or has a record of financial mismanagement. But when the university's decision not to fund expression is based on the content of that publication,

[1] As the Court of Appeals accepted without mention, the actions of a student government body that has been delegated authority for distributing funds by university officials are clearly attributable to the school itself. See, e.g., *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361, 362, 365-366 (8th Cir. 1988); *State Board for Community Colleges v. Olson*, 687 P.2d 429, 433 n. 4 (Colo. 1984).

the university must show that its decision is consistent with First Amendment free expression guarantees.

In this case, the parties agree that the content of *Wide Awake* is the sole reason for the university's determination that it is ineligible for funding. *Rosenberger*, 18 F.3d 269, 279 n. 25.[1] Thus the university must justify its action under the First Amendment.

The holdings of this Court leave little doubt that content-based speech restrictions come with a presumption of unconstitutionality. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time Inc.*, 468 U.S. 641, 648-49 (1984). See also, *Carey v. Brown*, 447 U.S. 455, 462-463 (1980); *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 229-230 (1987)

Despite the presumption against content-based restrictions, "governmental regulation based on subject matter has been approved in narrow circumstances." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 538 (1980). For example, "this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate purpose for which the property has been dedicated." *Id.*

Thus this case requires the court to determine if respondents' policy presents the "narrow circumstances" that allow some content-based regulation. In short, the Court must determine the standard by which a public university's decision to deny funding to a student publication based on content will be measured.

In other cases where denial of access to government largesse has been at issue, this Court has made clear that regulations that punish based on the "viewpoint" being expressed, *Rust v. Sullivan*, 500 U.S. 173, 192 (1991), or "aimed at the suppression of dangerous ideas," *Regan v. Taxation With Representation*, 461 U.S. 540, 550 (1983), are impermissible. But this case presents a factual context that justifies additional First Amendment scrutiny. "[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991)(citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 605-06 (1976)).

For more than two decades, this Court and others have noted the extraordinary importance of free expression and free press protections on the public college and university campus. "The college classroom and its environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1971). "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protection should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is no where more vital than in the community of American schools." *Id. Accord*, *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 671 (1973).[2] "The university setting of college-age

---

[2]The Court has distinguished the protections of the First Amendment at public secondary schools, where students' rights "are not automatically coextensive with the rights of adults in other settings." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(quoting *Bethel School District v. Fraser*, 478 U.S. 675, 682 (1986)). Students' First Amendment rights "on college campuses *are* coextensive with those in the community at large." *Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973)(citing *Healy*)(emphasis

students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas, so the underlying assumption that there is positive social value in an open forum seems particularly appropriate." *Antonelli v. Hammond*, 308 F. Supp. 1329, 1336 (D. Mass. 1970).

Courts around the nation have consistently held that the First Amendment does not allow a public college or university to take adverse action against a school-sponsored student publication, including the withdrawal or reduction of funding, because school officials disapprove of its content. *See, e.g., Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973)(withdrawal of funding for college newspaper because of its support for segregation); *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc with modification*, 489 F.2d 225 (5th Cir. 1973)(per curiam), *cert. denied*, 416 U.S. 995 (1974)(refusal to publish student literary magazine because of "earthy" language in stories regarding interracial love and Black pride); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983)(change in method of funding of student newspaper because of publication of "offensive" humor issue); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970)(demand that student newspaper be submitted to faculty advisory board for pre-publication review because of publication of column by radical activist); *State Board for Community Colleges v. Olson*, 687 P.2d 429 (Colo. 1984)(cut of funding for student newspaper based on editorial content).[3] "Censorship of constitutionally-protected expression cannot be imposed at a

added). "Few college students are minors, and colleges are traditionally places of virtually unlimited free expression." *Bystrom v. Fridley High School*, 822 F.2d 747, 750 (8th Cir. 1987).

[3]*See also Sinn v. Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973).

college or university by suspending editors of student newspapers, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorship oversight based on an institution's power of the purse." *Joyner*, 477 F.2d at 460 (footnotes omitted).

The standard enumerated by the Court of Appeals in the case at bar reflects a recognition of the important role the First Amendment plays in a public university setting. "In order to justify differential treatment of funding eligibility based on the content of the speech involved, 'The State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Rosenberger*, 18 F.3d at 281 (citing *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987). The Eighth Circuit Court of Appeals has followed the same standard in evaluating a denial of student activity funding on a university campus. "Content-based discrimination can be justified only if the government demonstrates that its regulation is narrowly drawn and is necessary to effectuate a compelling state interest." *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988)(citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1980).[4]

These courts have correctly articulated the standard for determining the First Amendment free speech and free press

[4]Neither the Court of Appeals in this case, nor the Eighth Circuit in *Gay and Lesbian Students Association v. Gohn* relied on public forum analysis, which more aptly applies to questions of access to government property, to determine the applicability of this standard. However, if the Court were to apply forum analysis, the particular importance of free expression on a university campus would indicate that a decision to fund such a wide variety of student activites, including 15 student publications, *Rosenberger*, 18 F.3d at 271, reflected a clear intent to creat a designated public forum for expression by students that would be governed by the same First Amendment standard followed by the Court of Appeals.

protections to which petitioners are entitled. For the forgoing reasons, the judgment of that portion of the Court of Appeals' decision should be affirmed.

Respectfully submitted,

S. Mark Goodman*
Michael Hiestand
Student Press Law Center
1101 Wilson Blvd.
Suite 1910
Arlington, VA 22209
(703) 807-1904

Counsel for Amicus Curiae

*Counsel of Record

December 15, 1994